IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-128

KRANCO, INC.,
Petitioner

against

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

1. The official report (decision and order) of the NLRB administrative law judge in this matter is reported at 228 NLRB No. 45 and is annexed hereto as Appendix 1.

2. The official report (decision and order) of the NLRB affirming the decision of the administrative law judge and adopting his recommended order in all material respects is officially reported at 228 NLRB No. 45 and is annexed hereto as Appendix 2.

3. The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit enforcing the order of the NLRB is unpublished and is annexed hereto as Appendix 3.

JURISDICTION

1. The decision and opinion of the United States Court of Appeals for the Fifth Circuit enforcing the order of the NLRB was dated and entered in the office of the clerk of the court of appeals on April 11, 1978. (Appendix 3)

2. Petitioner's Petition for Rehearing was denied by order of the United States Court of Appeals for the Fifth Circuit dated May 10, 1978, a copy of which is annexed hereto as Appendix 4.

3. The judgment of the United States Court of Appeals for the Fifth Circuit was entered in this cause on May 18, 1978, a copy of which is annexed hereto as Appendix 5.

4. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari pursuant to Title 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. General Question: Where an employer has been charged with a violation of §8(a)(1) and (3) of the Labor Management Relations Act in effecting employee terminations but has offered evidence of economic justification for same, under what circumstances may the employer be found in violation of such sections of the Act?

2. Specific Question: Where the NLRB has through circumstantial evidence presented a *prima facie* case of discriminatory employee terminations, what burden of proof must an employer meet to establish an issue of economic justification for such terminations?

3. Specific Question: Where the NLRB has through circumstantial evidence presented a *prima facie* case of discriminatory terminations, and the employer has offered evidence of economic justification for same, what burden of proof must the NLRB satisfy to establish a violation of § 8(a) (1) and (3) of the Act?

STATUTORY PROVISIONS

1. The issues presented in this petition involve the Labor Management Relations Act, Title 29 U.S.C. § 141, et seq. The relevant sections of the Act are § 158(a)(1) and (3) which read in pertinent part as follows:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition or employment to encourage or discourage membership in any labor organization. . . ."

STATEMENT OF THE FACTS: FACTS

Kranco is a Texas corporation engaged in the fabrication of special order industrial cranes ranging in size from comparatively small single girder cranes to enormous polor

cranes, weighing as much as 500,000 pounds and with lifting capacity of 500 tons. (Tr. 78, 453, 455)* The company's production operations consist of the fabrication, mechanical, machine shop, and coating departments. Prior to the period in question, Kranco employed at its Houston facilities approximately 130 production employees (Tr. 644, 649) about 100 of whom were assigned to the day and 30 to the night shift. (Tr. 61) Both shifts worked 10 hours a day, 5 days a week and also performed some Saturday work. (Tr. 121).

The year 1975 was favorable to Kranco, and in October of 1975 management submitted its 1976 budget which forecast an even better year (Tr. 456). Thereafter, a continuing series of events combined steadily to darken Kranco's commercial picture for 1976. Despite numerous interim measures, Kranco was unable to reverse the deteriorating trend in its business and during February the company began to consider a reduction in its work force (Tr. 471, 473-474). Finally, about the last week in February (Tr. 40, 474, 620) because of workload dissipation and no foreseeable improvement (Tr. 444), company management determined to effect same.

At about this same time the Carpenters District Counsel of Houston and vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America (Union) commenced a campaign to organize Kranco's production employees. Union handbilling in the company's parking lot on February 19, 1976 alerted management to the Union's efforts.

On March 4, the company terminated a number of its

* All citations herein are to the original transcript of these proceedings.

employees in its night shift fabrication department.[1] The Union then filed a charge with the NLRB alleging that such discharges were in violation of § 8(a)(3) of the Labor Management Relations Act and in due course the NLRB issued a complaint alleging same.

At trial, the NLRB presented a largely circumstantial evidence case including the facts that company management had announced both orally and in writing that it was adverse to the Union organizing effort, that the company committed contemporaneous unfair labor practices, that all terminated employees had signed Union authorization cards, that supervisor Michulka had conversed with employees and in so doing had learned that some of the employees who were eventually terminated supported the Union, that the employees were terminated on a Thursday rather than at the end of the workweek, that the employees were terminated rather than laid-off, that in December of 1975, Kranco had sent a Christmas card to its employees announcing that back-logs were the highest in the company's history and predicting a great year in 1976, and that at the time of the lay-off the company was advertising for new employees in the newspaper, was maintaining a "job openings" sign in the vicinity of the plant and was constructing additional facilities to expand its capacity. The Board further presented evidence that Kranco had never had a reduction in force before and that at various times in the past management had reassured employees in this regard. Finally, the evidence showed that when most em-

1. Following the initial reduction in force, the company continued to trim its work force during the next month. All told, during March and April there were approximately forty terminations, twenty of which were involuntary and about the same number voluntary, many of the latter having been caused by Kranco's elimination of overtime (Tr. 135, 136, 138, 472).

ployees were informed of their lay-off they simply shook hands with their supervisors and responded that they understood the situation (Tr. 276, 400); but allegedly one employee angrily charged that the employees were being terminated because of their support for the Union to which supervisor Michulka responded, as he often did in conversations with the employees, by nodding his head (Tr. 422, 436). However, the administrative law judge in reaching his decision expressly declined to give the supervisor's response any "great weight" (ALJD p. 12).

In response to this evidence, Kranco sought generally to explain the NLRB's circumstantial case.[2] More significantly, however, the company presented an exhaustively documented recitation of its economic justification for the terminations. Specifically, the company presented evidence that prior to the terminations it experienced a serious reversal in its business fortunes when it received notice of the cancellation of one large box girder crane and the postponement of 2 other box girder cranes for 1976 shipment to 1977, (Tr. 445). The cranes had a combined billing price in excess of $1,000,000.00 and

2. Notwithstanding the NLRB's exaggerated characterization of various aspects of its circumstantial evidence, the Board in this case was unable to present any "smoking gun" piece of evidence in support of its complaint. For example, the company's employment advertisements at the times of the terminations were for office and service rather than for production employees and all hiring of production employees had stopped prior to the terminations and had not recommenced at the time of trial. The administrative law judge in his decision also stated that when one of the terminated employees sought to reapply at Kranco for a crane service position, he was abruptly told that the minimum qualification "had just been increased" (ALJD at p. 12). In fact the minimum qualifications had not just been increased, and the employee was invited to return when the personnel manager was present to discuss the opening with him, but the employee never bothered to (Tr. 168, 608). In view of this obvious mischaracterization, Petitioner respectfully asks this Court to consider the NLRB's recount of the facts with a "grain of salt".

represented 25,000 to 30,000 man-hours of work (Tr. 446). Moreover in the latter part of December the number and amount of purchase orders began to decline (Tr. 444).

Despite interim measures, the company's oral and documentary evidence demonstrated that in January and February of 1976, inbound business virtually collapsed (Tr. 444, 555 et seq., R. Ex. 11, 12). The company's total January sales of $215,146, far from compensating for lost and postponed orders were approximately $700,-00 short of replacing the amount of business that was going out (Tr. 578). Although total sales rose to $452,106 in February, only $140,000 involved cranes deliverable in 1976. (R. Ex. 11) The purchase orders which the company received in January and February constituted only a small fraction of the total which it had previously predicted in its 1976 budget. In short, during this period, its bookings were lower than they had ever been before (Tr. 496).

Kranco further documented and illlustrated its adverse business circumstances through numerous other business records and summaries of business records. Thus its Summary of Billing and Shop Hours dated February 7, 1976, (R. Ex. 1) showed that the company was critically short of work which could be scheduled for all the remainder of 1976. Similar summaries further showed that just prior to the terminations the current backlog of orders for delivery in each remaining month for 1976 was but a fraction, in some cases a small fraction, of the purchase orders which had been budgeted and anticipated for each remaining month. Comparison of such summaries for 1975 and 1976 emphasized how far behind the company had fallen in booking purchase orders

for the remainder of 1976. Finally, the company's Summary of Billing and Shop Hours dated February 28, 1976, illustrated the key fact that as of that date, the hours remaining to complete all work originally scheduled for delivery in March amounted to only 8,103 man-hours. At that time the company's production force was working at a level of 18,000 man-hours per month. Thus, because of the size of Kranco's workforce, cancellation and postponement of existing orders and deterioration of inbound business, Kranco had in February completed most of the work that had originally been scheduled for March, work scheduled for April would therefore have to be moved up to March and after the April work was completed the company's "cupoard was bare".

In a final dramatic portrayal of the company's reversals, Kranco offered its Manufacturing Cost Summaries for 1973 through 1976, (R. Ex.'s 2, 3). A review of these documents demonstrated that throughout 1973, Kranco's production force worked an average of 1,052 man-hours per day and throughout 1975, 1,031 per day.[3] In no month during 1975 did the company's production average less than 906 man-hours per day; however, despite this past record company's exhibit 2 and 3 showed that between November of 1975 and April of 1976, the average daily hours worked by the company's production force plummeted from 1,196 to 619.[4]

3. This figure is directly related to the amount of work available in the shop.

4. Although not available at the time of trial, the company furnished the Fifth Circuit with the manufacturing cost summary for the entire year of 1976. Such exhibit confirmed that in May of 1976, the average daily man-hours worked fell to an all-time low of 474.

The company further fortified its position through the testimony of some of the alleged discriminatees who testified as NLRB witnesses and who candidly admitted before the reduction of force, work was "slow" (Tr. 398), that about 2 weeks before the termination work suddenly "started slowing down" and "at the time of the terminations there wasn't very much work going on in the shop" (Tr. 282). Such adversity was not peculiar to Kranco's operations for the entire industry was down 30% (Tr. 469). The company's information indicated that such condition was due principally to the general economy in which funds for capital equipment were scarce. More specifically major customers in the utility and energy industries had experienced numerous postponements and reschedulings and a lack of funds in their capital investment programs (Tr. 468-469). The gravity and magnitude of the problems eventually compelled not only the first reduction in force in the company's history but also the preparation and submission of the first revised budget in its history (Tr. 462, 463, 465).

In the final analysis, one irrefutable fact remains in this case—that although the company reduced its work force from approximately 130 to 90, eliminated all overtime and thereby almost cut in half the average daily man-hours worked, the company continued to meet or exceed production requirements. Under the circumstances, *how can it be doubted that the company had economic justification for the terminations it effected?*

In selecting the employees to be terminated, company witnesses further testified without contradiction that they selected employees in the fabrication department because it was the first step in the company's manufacturing pro-

cess and was the department where work shortage was most acute (Tr. 44, 88, 476). Company management further decided that in effecting such reduction in force within that department, initial terminations should come from the night shift, since the company intended to, and did, in fact, eliminate all night shift operations by April, 1976 (Tr. 117, 133), a traditional economic measure in response to adverse business conditions. Finally, as the administrative law judge found the company terminated night shift fabrication department employees on the basis of their seniority, (Tr. 90, 476) and thus all terminated employees in whose behalf the NLRB herein complains had less than a year's service with the company (Tr. 151, 193, 285, 297, 324, 391, 406, 408).

In the face of all of the foregoing the administrative law judge after a feeble and totally erroneous examination of the evidence supporting the company's economic justification completely discredited and labled as "pretextual" the company's explanation. In so holding, the administrative law judge (i) reasoned that all of the company's evidence concerning the company's cancellations and postponements of large crane orders in early 1976 should be discredited because the company offered no documentation in support of its oral testimony concerning same,[5] and (ii) simply dismissed all the rest of its evidence with the bald assertion that "other evidence of its business conditions consisted, in part, of self-serving and vague testimony and documents, some prepared after the fact"

5. In its appeal from the decision of the administrative law judge, Kranco urged the Board to reopen the record pursuant to Board Rule 102.48(b) to permit the company to submit such documentation. (Exceptions and Brief of Kranco, Inc., p. 13) The Board, however, refused.

(ALJD at p. 10). Thus the failure of the company's explanation to withstand scrutiny became further evidence of its guilt. *Publisher's Offset, Inc.*, 225 NLRB No. 149 (1976). Without explanation the NLRB and the Fifth Circuit affirmed the administrative law judge's disposition of the case.

ARGUMENT

Certiorari should be granted because:

(1) the decision of the court of appeals in the instant case adopting and enforcing the board's decision and order, squarely conflicts with a decision of another court of appeals on the same matter and a decision of the Supreme Court on a similar matter.

(2) this case involves basic and important questions of law which conflicting circuit court opinions indicate have become increasingly unsettled;

(3) the issues herein raised have never been passed upon by the Supreme Court.

We shall discuss each of these points separately.

1. *The decision of the court of appeals in the instant case squarely conflicts with a decision of another court of appeals on the same matter and a decision of the Supreme Court on a similar matter.*

The Fifth Circuit's adoption and enforcement of the Board's decision and order in this case produces a holding which is entirely discordant with that of the First Circuit Court of Appeals in *Stone and Webster Engineering Corp. v. NLRB*, 536 F.2d 461 (1st Cir. 1976). In that case, after the Board had proven a prima facie case

of discriminatory terminations, the company presented a substantial amount of basically unrefuted evidence as to the business reasons motivating the company's decision to terminate the employees. Nevertheless the administrative law judge discredited such explanation on the grounds that (i) tne company had failed to present any documentary evidence to substantiate its explanation and (ii) the testimony of the company's witnesses was "unconvincing", "vague, inherently inconsistent and contradictory". The First Circuit reproved such analysis stating that it evidenced a basic misconception concerning the governing burdens of proof.

> "When the evidence of the charging party has raised a reasonable inference of discrimination, that inference may still be rendered unreasonable by the employer's excuse or justification . . . so that more evidence must be produced to establish the alleged discrimination" Id. at 466.

The First Circuit then concluded that the employer having presented a substantial amount of evidence supporting a business justification, the burden then shifted to the Board either to directly challenge the accuracy of the evidence concerning economic necessity or affirmatively show that it was a cloak for actual discriminatory motivation, i.e., that only union adherents were selected for termination. *Id.* at 466

The instant case is factually indistinguishable from *Stone and Webster Engineering*.[6] In each case the employers business justification was discredited in exactly the same fashion. However, as the First Circuit has held

6. Even the basic cause for the down turn in the two company's business is identical.

"it is not enough, as in the case at bar, to ignore or denigrate the business reason, or substitute speculation in its place" *NLRB v.* Fibers International Corp., 439 F.2d 1311 (1st Cir. 1971).

Further, to the extent that the administrative law judge articulated any refutation of the company's economic justification in the present case, he relied primarily, if not exclusively, upon facts which while tending to support a *prima facie* case of discrimination, did not directly disprove the company's economic defense. Analyzing the case in this manner, in essence, affords conclusive and irrebuttable weight to only a *prima facie* showing, a result which is clearly contrary to this Court's recent teachings in *Furnco Construction Corp. v. Waters,* 46 LW 4966, 4970 (1978).

2. *This case involves basic and important questions of law which are presently unsettled.*

In those cases wherein the Board has given begrudging acceptance to an employee's economic justification, it has then been encumbent upon it explicitly to demonstrate that an improper motivation contributed to the discharge. E.g., *Cains Coffee Co. v. NLRB,* 404 F.2d 1172 (10th Cir. 1968). However, in such cases the Board has adopted a lenient test that has permitted it to sustain a violation where it could show that the terminations were motivated "in substantial part" by union animus. E.g., *Coletti's Furniture, Inc. v. NLRB,* 550 F.2d 1292 (1st Cir. 1978). The various circuits have sharply divided on the issue of the "quantum of animus" which must be shown to support a § 8(a)(3) violation. See *Western Exterminator Co. v. NLRB,* 565 F.2d 1114, 1118 n. 3 (9th Cir. 1977). Some circuit court authori-

ties have adopted a more stringent rule requiring that when a discharge appears motivated by both a legitimate business consideration and protected union activity, the test is whether the business reason or the protected union activity is the moving or dominant cause behind the discharge. Id. at 1118. Other courts have restated this stricter test to require the Board to show under such circumstances that the termination would not have occurred "but for" the employee's union activity. *NLRB v. Rich's of Plymouth, Inc.*, 98 LRRM 2685 (1st Cir. 1978).

This Court has firmly rejected the "in substantial part" test and adopted instead the "but for" test in the analogous first amendment area. *Mount Healthy School District Board of Education v. Doyle*, 97 S.Ct. 568 (1977). The Court's holding in that case would appear equally valid in the instant circumstances. However, despite repeated circuit court reversals, the NLRB seems defiantly committed to its less stringent test. See particularly court criticism of the Board in *NLRB v. Rich's of Plymouth, Inc., supra* at 2689, 2690. Clearly it is not the function of the NLRB to second-guess business decisions, and the NLRB's lenient test which just as clearly permits such intrusions should not be perpetuated.

3. *The Supreme Court has never passed upon the issues raised.*

The Supreme Court has never directly addressed the basic and fundamental questions herein at issue, and as the foregoing indicates the circumstances which persuaded this Court to address similar issues in *Furnco Construction Corp.* are equally compelling in the present context.

SUMMARY AND CONCLUSION

It has long been said that "silence is one of the hardest things to refute", and in attempting to sustain the administrative law judge's decision, such argument is the only one that either the NLRB or the Fifth Circuit Court of Appeals has been able to make in response to the contentions of the instant petitioner. The resulting disposition, however, leaves (i) undetermined the burden of proof that an employer must initially satisfy to sustain an economic defense, (ii) unchecked the NLRB's propensity to label an employer's economic justification pretextual to avoid the necessity of presenting anything more than a *prima facie* case to sustain an 8(a)(3) violation and (iii) unresolved the conflict concerning the "in substantial part" test which the Board applies to further discredit an employer's economic defenses and correspondingly to lessen any further burden of proof that it must satisfy. Had the correct "but for" test been applied in the instant case, one would not conclude that the Board had sustained its burden. Accordingly writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit in order that these basic issues may be finally resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been served upon Mr. Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570, and Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same to them postage prepaid, at their respective addresses this _____ day of July, 1978.

CLINTON S. MORSE

APPENDIX 1

JD-646-76
Houston, TX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 23-CA-5975

KRANCO, INC.,
Respondent
and
CARPENTERS DISTRICT COUNCIL OF HOUSTON & VICINITY, affiliated with UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA,
Charging Party

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DECISION

Statement of the Case

MICHAEL O. MILLER, Administrative Law Judge: This matter was heard in Houston, Texas on May 12,

13 and 14, 1976. The complaint issued on March 31, 1976, pursuant to a charge filed on March 4, 1976, was amended at hearing and alleged violations of Sections 8(a)(1) and (3) of the Act. Respondent's timely filed answer was also amended at hearing. All parties have filed briefs.[1]

Upon the entire record herein, including my observation of the witnesses as they testified, I hereby make the following:

Findings of Fact and Conclusions

I. The Employer's Business and the Union's Labor Organization Status

Kranco, Inc., herein called Respondent, is a Texas corporation engaged in Houston, Texas, in the manufacture and sale of overhead cranes. Jurisdiction is not in issue. The complaint alleges, the answer admits and I find and conclude that Respondent is an employer engaged in commerce within the meaning of section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits and I find and conclude that Carpenters District Council of Houston & Vicinity, affiliated with United Brotherhood of Carpenters & Joiners of America, herein called the Union, is a labor organization within the purview of Section 2(5) of the Act.

1. Respondent filed a reply brief, to which General Counsel objected and moved to strike, correctly asserting that the Board's Rules and Regulations do not provide for reply briefs to the Administrative Law Judge. *J. E. Cote,* 101 NLRB 1486, fn. 4 (1952). Thereafter, General Counsel filed a Motion requesting that I take notice of a recent Board decision and urging that it be deemed dispositive of the issues herein. General Counsel's motion is, itself, in the nature of a reply brief and I deem its filing a waiver of General Counsel's objections to my receipt of Respondent's reply brief. Additionally, I note that both post-brief submissions facilitated and did not delay my resolution of the issues herein. Accordingly, I deny General Counsel's motion to strike, and have considered both documents. See *Cavender Oldsmobile Company,* 181 NLRB 148, TXD fn. 2 (1970).

II. The Alleged Unfair Labor Practices

A. *Union Activity*

Overt union activity among Respondent's employees began on February 19, 1976 (all dates hereinafter are 1976 unless otherwise specified) with a distribution of literature and authorization cards in front of the plant. The activity immediately came to the attention of Raymond Vajdak, plant superintendent, and John Pearson, personnel manager. Pearson telephonically reported it to Thomas J. Lee, Respondent's Executive Vice President, who was out of town at the time.[2] A distribution on February 24 announced meetings to be held on February 26, with the day and night shift employees. The night shift met with union representatives at a restaurant following the end of their shift. Authorization cards were distributed and approximately 16 of the 30 night shift employees signed and returned cards at that time. Several more were returned by W. C. Bowen, the Union's in-plant organizer. An additional meeting was held with the night shift employees on March 1. A representation petition, bearing the date of March 4, was filed by the Union (Case No. 23-RC-4359).

2. The supervisory status of Lee, Vajdak and Pearson is admitted.

B. *The Employer's Response—Alleged Section 8(a)(1) Violations*

Kranco's official response was a letter from its president to the employees, distributed on March 2. The

letter urged employees not to select union representation and based its arguments upon the costs of union dues, fines and assessments, the risk and financial burdens of strikes, the Union's lack of interest in them or investment in the plant, the Union's alleged misuse of money, and the disadvantages of a seniority system, grievance procedure and check off. Specifically, the letter stated, *inter alia*:

> These strangers are not out getting customers to buy our cranes so you will have work. They are not putting up their money to make this a safe comfortable place to work. They are not doing anything for you except causing you to risk everything so they can collect tribute from you.
>
> * * *
>
> The threats to your welfare come from the Union —not the company.
>
> * * *
>
> You would not like a union contract hanging over you.
>
> You would not like "job classifications" which pegs you and freezes your pay.
>
> You would not like "seniority" which limits your progress.

Various employees testified in regard to conversations with night supervisor Tommy Michulka (supervisory status admitted) both before and after the March 2 letter issued. Michulka did not testify. General Counsel contended that these conversations violated Section 8(a)(1). Thus, W. L. Gilmer testified that on the evening of February 27, Michulka came up to him and asked what he thought about the Union. Gilmer gave a noncommittal answer. Steven Norton testified that while he was reading

Respondent's March 2 letter, Michulka asked him, "Are you for the Union?" and what he thought of it. They had a brief discussion of their opposing points of view. Michulka also asked Scott Forbes whether he had a union card and if he knew who was passing them out. In yet another conversation, after Forbes had asked Michulka whether Michulka knew that W. C. Bowen was the Union spokesman on the night shift, Michulka asked him who the spokesman was for the day shift. I credit the foregoing testimony and find that the foregoing conversations constitute inherently coercive interrogations in violation of Section 8(a)(1) of the Act. *Crown Zellerbach Corporation*, 225 NLRB No. 130 (1976); *P.B. and S. Chemical Corporation*, 224 NLRB No. 1 (1976). That Michulka may have enjoyed a rapport with his employees, may have been well thought of by them and even may have been considered a friend by some, does not negate the coercive nature of questions seeking to elicit the union sympathies of a particular employee and others. As the Board noted in *Quemetco, Inc.*, 223 NLRB No. 53, sl. op. 3 (1976):

> An employee is entitled to keep from his employer his views concerning unions, so that the employee may exercise a full and free choice on the point, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction that his views may stimulate in the employer. That the interrogation may be suave, courteous, and low-keyed instead of boisterous, rude, and profane does not alter the case. It is the effort to ascertain the individual employee's sympathies by the employer, who wields economic power over that individual, which necessarily interferes with or inhibits the expression by the individual of the free choice guaranteed him by the Act.

Employees Bowen, Gilmer, Melvin and Mason relate hearing statements by Michulka to the effect that they should not get "messed up" with the Union because it was "no good," that they did not want the Union, and that it would only cause trouble, the latter two statements phrased crudely and profanely. Such statements, I find, do not contravene the Act's provisions; they are mere statements of permissible opinion.

On March 2, Bowen approached Michulka and asked him, "What position would it put me in with the company toward being fired or dismissed if I was to say that I was an organizer and promoter for the Union on the night shift?" Michulka asked him what he was talking about and Bowen stated that he was the promoter of the Union on the night shift. Michulka first told Bowen that he could not answer him, but, when pressed, said that it would not affect his employment. Later that evening, according to Bowen, Michulka asked Bowen if he was the Union's organizer on the night shift and Bowen hesitantly answered that he was. In light of Bowen's earlier volunteered admission of his role, I cannot find Michulka's subsequent question to constitute coercive interrogation.

About March 1, Mason heard a conversation between Robert Chapman, day electrical foreman (supervisory status admitted) and Walter Schultz, in which Chapman asked Schultz, "Just between me and you . . . how do you feel about this Union? It won't go any further."[3] I credit Mason's uncontradicted testimony and conclude, for the reasons set forth *supra*, that Chapman's questioning of Schultz constituted coercive interrogation in violation of Section 8(a)(1).

3. Mason was Schultz' helper and worked in close proximity to him. Chapman did not testify.

During the week of February 25 to March 1, employee James Armstrong participated in a conversation with two other employees who were talking about pay raises they had received. David Rattray, who was contended by General Counsel to be the night electrical foreman and a statutory supervisor, joined the conversation. He told the employees that when a union had previously tried to come in, the employer had made promises to the employees and was giving these raises now so that the employees would not vote for the Union. Rattray did not testify.

Respondent denied that Rattray was a supervisor and contended that he was only the lead electrician on the night shift. The record reflects that Rattray was on the night shift for about 3½ months. He was hourly paid, at the rate for a lead electrician on that shift. Admitted supervisors were salaried. Rattray worked with two other employees in the electrical department, a trainee and a helper; he was also observed, from time-to-time, telling the trainee and the helper what to do, checking their work, reassigning them from job to job, working with them and sitting in the office reading or taking coffee while the others worked. In all, there were about 30 people on the night shift during February. Michulka was the only admitted supervisor working on that shift. According to plant superintendent Vajdak, Rattray received his instructions for the night's work on a work schedule from the electrical foreman on the day shift and would follow that schedule in performing or assigning work. Rattray did not appraise the work of the others in the electrical department on the night shift or

make recommendations regarding wage increases. That was done by the day foreman by examination of the work performed and the work sheets completed. On one occasion, Rattray was involved in the discharge of an employee: Michulka had reported to Vajdak that he had complaints from Rattray that a given employee would not respond to work instructions and would wander away from his work area. Vajdak gave instructions to the day foreman that if the conduct was repeated, that employee was to be terminated. When Rattray again reported an infraction by this employee, he was terminated. The termination was effected by Rattray.

Based upon the foregoing, I conclude that David Rattray did not possess or exercise the statutory authority indicative of supervisory status. He was but a conduit of management's instructions to himself and other employees within the small department in which he worked. In so concluding, I note that there was a supervisor on duty at all times and that if Rattray were to be found a supervisor the electrical department would have been the only department so directly supervised on the night shift. Accordingly, I shall recommend dismissal of the alleged Section 8(a)(1) violation attributed to Rattray.

Clifford Melvin began working for Respondent about October 10, 1975, as a fitter helper, at $3.30 per hour plus 20 cents night shift differential. After 3 months of employment he questioned Michulka about a raise he believed due him. Michulka subsequently told him that under a new company policy, raises were not due for 6 months. About February 1, a fitter quit and Melvin was promoted into his place. He spoke to Michulka about his raise and was told that he would be put in for a raise, to about $3.80 per hour. He learned that he was receiving

a 70 cents raise on the Monday following the first Union meeting. He received the raise in the pay he received on March 3, the night he and others were terminated. It was one of the largest raises given by Respondent. It placed Melvin into the second step of the trainee classification. General Counsel contended that Melvin's raise was given to dissuade support for the Union, and thus violated Section 8(a)(1). Melvin had received a bona fide promotion, prior to the Union activity and his raise was consistent with that promotion. The evidence is insufficient to warrant a finding that the raise was intended to interfere with the exercise of free choice by either Melvin or any other employee.

On March 4, the day following the termination of 10 night shift employees (discussed *infra*), Lee called meetings for the day and night shifts. In his speech to each group he spoke about both the terminations and the Union campaign, and he admitted that the latter was what occasioned the meetings. He described how orders had slacked off or been cancelled. He described the Company's recent acquisition of Euclid Crane Company in Cleveland, Ohio. James Hindman, who attended the the day shift meeting, and C. L. Cullever, who attended the night shift meeting, both attributed to Lee a statement to the effect that Respondent could transfer work from Euclid to Kranco if Kranco's work became slack but that he would not do so if the Union came in. Lee denied making this statement and claimed that he told the employees that they did not want the Union to come in and that some of their customers might object to buying a crane from a shop that was unionized, because of the potential for work stoppages. Cullever recalled Lee making the latter statement; Hindman did not. Pearson confirmed Lee's

version of the speeches. Based upon the foregoing testimony and my observation of the comparative demeanors of the witnesses I credit the testimony of the employee witnesses, Hindman and Cullever.[4] Accordingly, I find that in his speeches of March 4, Lee threatened employees with diminished work oportunities in the event that they selected the Union to represent them in violation of Section 8(a)(1). I note also, in reaching this conclusion, that even crediting Lee's version, Lee's statement that customers might not want to do business with them if unionized, constituted an impermissible threat of loss of employment opportunities. This was an employer prediction of adverse consequences stemming from unionization unsupported by the requisite objective factual basis. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618-120 (1969); *Hertzka and Knowles*, 206 NLRB 191, 194-195 (1973).

C. *The Alleged Discrimination*

In the early morning hours of Thursday, March 4, at the conclusion of the night shift which had begun on March 3, Respondent discharged 10 employees from its structural department: J. L. Armstrong, Danny Starnes, Steven Norton, Dan Mason, Scott Forbes, Kenneth Carriere, Clifford Melvin, W. L. Gilmer, Steve Hundl and William C. Bowen. They were informed, by a letter read to them at that time, that "reversals in the business situation, as it has affected several of our customers, has resulted in cancellations of orders and postponements in

4. Cullever was still employed by Respondent at the time he gave this testimony. That he would so testify, and incur the potential enmity of his employer, is an additional factor I have considered in deeming him credible. *Georgia Rug Mill*, 131 NLRB 1304, 1305, fn. 2 (1961).

other cases, thus causing a shortage in our workload. This in turn has caused us to discontinue our night fabrication work." All of these employees had attended union meetings and/or signed union authorization cards. On March 12, James Hindman, a day shift welder, was also terminated, supposedly for the same reasons. Hindman had signed a union authorization card on February 25 and had attended a union meeting on March 9. At that meeting he was appointed as a witness to accompany the newly appointed in-plant committee to see Superintendent Vajdak when they went to inform him that they would be soliciting membership in the plant. The committee, and Hindman, so informed Vajdak on March 10. Those terminations were the first in Kranco's history for such alleged reasons. Indeed, new employees were regularly told that they did not have to worry about layoffs.

Respondent asserts that the discharges were unrelated to the Union activity and were solely motivated by adverse business conditions. The record reflects the following:

1975 was a record year for Kranco. Gross revenues exceeded $9 million and after tax earnings were approximately $750,000. On December 12, 1975, Respondent's employees were sent a letter of season's greetings, informing them of the record established and stating that they were going into 1976 "with the largest backlog [of orders] in the history of our company." As of October 1975, Respondent had prepared a budget for 1976 anticipating another record year, increasing after tax earnings by approximately $80,000. However, according to Respondent's witnesses, business began to slack off in December 1975. An order for one crane was cancelled and

two orders that had been scheduled for 1976 delivery were postponed until 1977. These cranes had a total value of approximately $1,200,000 and allegedly represented 25,000 to 30,000 shop hours.[5] The pace of new incoming orders also slackened, according to this testimony, and even with increased sales effort, including an alleged reduction in profit margin, sales did not keep pace with cranes being shipped. Respondent introduced summaries reflecting its backlog of orders (in dollars) and the estimated number of shop hours required to complete those orders, as of March 1, 1975, February 7, 1976 and February 28, 1976. Those summaries show as follows:

	3/1/75 dollars/est. hours	2/7/76 dollars/est. hours	2/28/76 dollars/est. hours
March	— 616,623/18,388	840,903/25,710	905,976/20,725
April	— 897,160/28,834	465,945/13,375	629,048/21,631
May	— 524,343/13,093	192,360/ 4,440	203,560/ 4,605
June	— 760,420/23,465	490,275/10,690	490,383/10,721
July	— 365,940/ 8,746	607,529/12,955	627,427/12,946
August	— 804,241/19,175	34,700/ 793	69,930/ 1,068
Sept.	— 683,082/18,378	48,250/ 725	48,250/ 725
Oct.	— 284,204/ 7,734	276,815/ 6,110	267,930/ 6,005
Nov.	— 455,102/13,000	1,434,392/18,615	1,434,392/18,615
Dec.	— 572,295/17,330	55,018/ 855	52,722/ 855

These summaries do not, of course, reflect orders which might be received (or lost) after their respective dates. Respondent also introduced summaries showing that in 1973, the plant had worked an average of 1,052 man hours per day. The average was 1,045 hours per day in 1974 and 1,031 in 1975. The plant worked an average of 1,026 hours per day in January 1976, 914 in February

5. No documentary evidence identifying or describing these orders was adduced during the hearing.

and 723 and 619 respectively in March and April, after the terminations. In 1975, during the months of February, March, April, and May, the average daily hours worked had been 932, 906, 956, and 915 respectively. Vajdak testified that they were able to meet or exceed production requirements with the reduced manpower.

Overtime was a regular feature of employment with Respondent and there were 10-hour days and Saturday work throughout 1975 and until the end of January 1976. The plant continued to work 9 hours per day, on both shifts until the end of March, when the plant finally went on an 8-hour day. Lee and Vajdak testified that they did not reduce overtime earlier, in lieu of the terminations, because they feared an adverse impact on morale.

According to Lee and Vajdak, a decision to reduce the workforce was made in the last week in February, about a week before the discharges actually took place.[6] Vajdak testified that his instructions from Lee were to reduce the force by 30 to 35 percent. The details of how and who were supposedly left to Vajdak and Pearson.[7] Lee made decision to effectuate the reduction on the morning of March 3. The record reflects no evidence of any specific precipitating event on or about that date. Vajdak chose to eliminate 10 employees from the structural department on the night shift, on the basis that approximately 50 percent of production work is performed in the structural department and that is the department where production

6. Pearson allegedly took part in this decision. However, his testimony as to when the decision was made was vague, shifting and conjectural.

7. Neither Lee nor Pearson testified as to any communication, at that time, to effect a reduction by a specific percentage of the workforce.

on new cranes begins. The terminations followed seniority among those in that department on that shift. No employees were transferred to the day shift or offered the opportunity to go into other departments.[8] In all, there was a reduction of the workforce by about 40 employees by the end of April; about one-half during March and the remainder in April. Approximately half of the reduction occurred through natural attrition. The night shift was shut down at the end of April and employees on that shift who were not terminated were transferred to days.

General counsel contends that the evidence establishes that the discharges were motivated by the employees' union activities, rather than the business conditions, and were thus violative of Section 8(a)(3). Upon the evidence in its entirety I am constrained to agree with General Counsel.

All of the elements for finding the discharges to have been substantially motivated by the union activities are present herein. See *Publishers' Offset, Inc.*, 225 NLRB No. 149 (1976). Respondent had knowledge that its employees were engaging in union activity and, from the conversations occurring on the night shift between Michulka and the employees, had reason to conclude that the activity was strong, if not centered, among the night shift employees in the structural department. All of the discharged employees were, in fact, card signers. Respondent also demonstrated union animus by its March 2 letter,[9]

8. Respondent's production is a continuous process; the night shift does not work on separate projects. Rather, it continues from where the day shift leaves off.

9. The complaint did not allege the letter to be independently violative of Section 8(a)(1). However, I deem its statement that the Union was causing employees to "risk everything," a thinly veiled threat evidencing animus.

the interrogations by Michulka and Chapman, and by Lee's March 4 speeches which contained threats of job loss in the event of successful union organization. Such "antiunion bias and demonstrated unlawful hostility are proper and significant factors for Board evaluation in determining motive." *N.L.R.B. v. Dan River Mills*, 274 F.2d 381 (C.A. 5, 1960); *Publishers' Offset, Inc., supra.*

The timing of the discharges in the instant case, and their precipitous nature, further evidence the unlawful motive. Even crediting Respondent's witnesses in regard to the decision to reduce the workforce, that decision was made almost immediately upon the inception of the union activity and Respondent's acquisition of knowledge thereof. The discharges took place in that same time span and on the day between Respondent's antiunion letter and Lee's antiunion speeches. They also occurred in mid-week, with no advance warning to the employees, and in the absence of any event which might have occasioned such precipitous action.

Finally, for a number of reasons, I find Respondent's economic defense unpersuasive. Central to its contention was the alleged loss of one order and the postponement of two others. Details of these transactions, including the size, scope and timing, and documentary evidence thereof (which must necessarily have existed in contracts of such magnitude) were not offered. Other evidence of its business conditions consisted, in part, of self serving and vague testimony and documents some prepared after the fact. More significant, however, are the inconsistencies in Respondent's actions. In December, it boasted of a record year with another to follow. Even allowing for some reduction in business, the evidence did not establish

that sales would be significantly below of 1973, 1974, and 1975, when the plant operated, without reductions-in-force, at an average of over 1,000 man hours per day. Moreover, Respondent's exhibits establish that as of both February 7 and February 28, 1976, the backlog the orders for March was higher than it had been for the same month 1 year earlier. Further, these same exhibits reveal that between February 7 and February 28, the backlog of orders for April delivery increased by more than a third, over $160,000 and increased the necessary shop hours by approximately 8,000. I further note, in this regard, that, as Respondent admitted, the early months of each year was its usual slow period.

Additionally, Respondent had met slow periods before without layoffs and, indeed, this and the regularity of overtime were selling points in the hiring of new employees. Respondent continued its overtime, 2 hours per day per employee plus Saturday work through January, and 1 hour per day even after the discharges in question, even though it claimed to be looking for solutions to the slackening off of business as early as December 1975. With approximately 130 employees, 2 hours of daily overtime equals 390 paid man hours per day; eliminating even the 1 hour of daily overtime worked after February saves 195 paid man hours per day without any terminations. I find unpersuasive Respondent's argument that reduction in overtime threatened to create a morale problem. It seems clear that discharges, after a history that did not even include layoffs, would be at least equally threatening to morale. Further, faced with an alleged economic situation warranting a reduction in profit margins, it is unlikely that Respondent would have rejected the savings potential of premium pay. I note, too, that

while there was no evidence of any permanent change in the pattern of Respondent's business, Respondent did not lay off the employees in question, they discharged them.

Casting further doubt on Respondent's claimed motivation and indicating the precipitous and inconsistent nature of the discharges are various personnel actions by Respondent. Notwithstanding the alleged decline in business, James Hindman was hired on February 16, as a welder. Several of the employees terminated on March 4 were welders, with greater seniority than Hindman. As previously noted, Clifford Melvin received a substantial wage increase effective in the week before his discharge. He actually saw this increase, for the first time, in the pay he received after discharge. Additionally, Respondent continued to advertise for employees all during the period of its alleged crisis. A trailer, advertising job openings, remained outside the Kranco premises until the end of March. Respondent's explanation, that it was paid for on a monthly basis and was retained through March because it was paid for, is implausible and, even if believed, does not explain why it would have been rented for the months of January, February and March in the face of the alleged loss of business. Moreover, Respondent ran newspaper advertisements for crane service personnel and crane service trainees (bargaining unit positions) after the March 4 discharges, gave no consideration to any of the discharged employees for such positions and when one of the discharged employees applied for such a job, informed him that the minimum qualifications for the job had just been increased. Considering all of the above, I conclude that "Respondent's unconvincing reasons for the [discharges] actually support the General Counsel's

prima facie case of unlawful discrimination." *Paramount Metal & Finishing Co.*, 225 NLRB No. 61 (1976).

Finally, while I do not give it great weight, I note that when Gilmer confronted Michulka with the statement that they both knew that the employees were being terminated because of the Union, Michulka did not deny it. Instead, he nodded his head in the manner normally recognized as signifying agreement.[10]

Accordingly, I find that by discharging the 10 previously named employees from the night shift on March 4, and by discharging James Hindman on March 12, Respondent has discriminated against those employees because of their union activity, and has thereby violated Section 8(a)(3) of the Act.

III. *Further Conclusions of Law*

1. By threatening employees with loss of employment opportunities or other reprisals, and by interrogating employees concerning their union activity, membership and support, Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed them under Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

2. By discharging the employees named below in order to discourage union activity, membership and support, Respondent has discriminated in regard to the hire and tenure of their employment, in violation of Section 8 (a)(3) and (1) of the Act:

10. I do not deem Michulka's implied admission sufficient to constitute an independent violation of Section 8(a)(1) as alleged in the complaint.

J. L. Armstrong	Clifford Melvin
Danny Starnes	W. L. Gilmer
Steven Norton	Steve Hundl
Dan Mason	William C. Bowen
Scott Forbes	James Hindman
Kenneth Carriere	

3. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not engaged in any unfair labor practices not specifically found herein.

IV. *The Remedy*

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily discharged the employees named in paragraph III (2) above, Respondent shall offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and shall make them whole for any loss they may have suffered by reason of the discrimination against them. Any backpay found to be due shall be computed in accordance with the formula in *F. W. Woolworth Company*, 90 NLRB 289 (1960), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

"A violation of Section 8(a)(3) goes to the very heart of the Act." It therefore warrants that Respondent be

further required to cease and desist from infringing in *any other manner* upon the rights guaranteed employees by Section 7 of the Act. *Pan American Exterminating Co.*, 206 NLRB 298, fn. 1 (1973); *Entwistle Manufacturing Company*, 23 NLRB 1058, enforced as modified, 120 F. 2d 532 (C.A. 4, 1941).

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

ORDER

The Respondent, Kranco, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Threatening employees with loss of employment opportunities or other reprisals in order to discourage union activity, membership and support.

(b) Interrogating employees concerning their union activity, membership and support.

(c) Discouraging membership in or activities on behalf of any labor organization, by discharging or otherwise discriminating against employees in any manner with regard to their rates of pay, wages, hours of employment, hire, tenure of employment or any term or condition of their employment.

11. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer the following named employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy:"

J. L. Armstrong	Clifford Melvin
Danny Starnes	W. L. Gilmer
Steven Norton	Steve Hundl
Dan Mason	William C. Bowen
Scott Forbes	James Hindman
Kenneth Carriere	

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other documents necessary and relevant to analyze and compute the amount of backpay due under this Order.

(c) Post at its Houston, Texas facility copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

12. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed in all other respects.

Dated at Washington, D.C.

/s/ MICHAEL O. MILLER
Michael O. Miller
Administrative Law Judge

APPENDIX

JD-646-76

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all sides had a chance to give evidence, an Administrative Law Judge of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice.

The Act gives all employees these rights:

To engage in self-organization;

To form, join or help a union;

To bargain collectively through a representative of their own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all these things.

WE WILL NOT do anything that restrains or coerces employees with respect to these rights. More specifically:

WE WILL NOT discharge or otherwise discriminate against employees because they engage in union activities.

WE WILL NOT interrogate our employees concerning their union membership, activity or support.

WE WILL NOT threaten employees with loss of employment or other reprisals if they engage in union activity or select a union as their collective bargaining representative.

WE WILL NOT, in any other manner interfere with, restrain or coerce our employees in the exercise of their rights as set forth above.

WE WILL reinstate the following named employees to their former jobs, without prejudice to their seniority and other rights and privileges, and WE WILL make them whole for any loss of earnings with backpay plus 6 percent interest.

J. L. Armstrong
Danny Starnes
Steven Norton
Dan Mason
Scott Forbes
Kenneth Carriere
Clifford Melvin
W. L. Gilmer
Steve Hundl
William C. Bowen
James Hindman

KRANCO, INC.
(Employer)

Dated ——— By ———————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions

may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Houston, Texas 77002, Suite 920, (Tel. No. 713-226-4722).

APPENDIX 2

MFP

228 NLRB No. 45

D—2171
Houston, Tex.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 23-CA-5975

KRANCO, INC.

and

CARPENTERS DISTRICT COUNCIL OF HOUSTON & VICINITY, AFFILIATED WITH UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA

DECISION AND ORDER

On October 8, 1976, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, both the General Counsel and Respondent filed exceptions and supporting briefs and Respondent filed a brief in opposition.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Kranco, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Insert the following as paragraph 1(c) and reletter the following paragraphs accordingly:

"(c) Threatening employees by indicating that employees have been terminated because of their support for the Union."

2. Substitute the attached notice for that of the Administrative Law Judge.

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1. The Administrative Law Judge found that, at the time of Respondent's March 4 discharge of its night-shift employees, employee Gilmer confronted Supervisor Michulka with the statement that they both knew that employees were being terminated because of the Union. Michulka nodded his head in the manner normally signifying agreement. Unlike the Administrative Law Judge, we find that this acknowledgement that employees were discharged because of their support for the Union violated Sec. 8(a)(1) of the Act. Certainly, if a threat to discharge violates Sec. 8(a)(1), *a fortiori*, an acknowledgement (or statement) that union activities precipitated the discharge would constitute a violation of that section of the Act. Indeed, to employees who were not discharged, it was tantamount to a threat of similar treatment for them if they chose to engage, or continued to engage, in union activities.

Dated, Washington, D.C. February 18, 1977.

Betty Southard Murphy, Chairman

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

D—2171

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, an Administrative Law Judge of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice.

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help a union
To bargain collectively through a representative of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all these things.

WE WILL NOT do anything that restrains or coerces employees with respect to these rights. More specifically:

WE WILL NOT discharge or otherwise discriminate against employees because they engage in union activities.

WE WILL NOT interrogate our employees concerning their union membership, activity, or support.

WE WILL NOT threaten employees with loss of employment or other reprisals if they engage in union activity or select a union as their collective-bargaining representative.

WE WILL NOT indicate to our employees that employees have been terminated because of their support for the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights as set forth above.

WE WILL reinstate the following named employees to their former jobs or, if such jobs are no longer available, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and WE WILL make them whole for any loss of earnings with backpay plus 6-percent interest.

J. L. Armstrong	Clifford Melvin
Danny Starnes	W. L. Gilmer
Steven Norton	Steve Hundl
Dan Mason	William C. Bowen
Scott Forbes	James Hindman
Kenneth Carriere	

KRANCO, INC.
(Employer)

Dated ——— By ———————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions

concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Suite 920, Houston, Texas 77002, Telephone 713-226-4722.

APPENDIX 3

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1693

KRANCO, INC.,
Petitioner, Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board

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(April 11, 1978)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM: ENFORCED. See Local Rule 21.[1]

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1. See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX 4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1693

KRANCO, INC.,
Petitioner, Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board

(TEXAS CASE)

ON PETITION FOR REHEARING

(May 10, 1978)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ HOMER THORNBERRY
United States Circuit Judge

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1693

KRANCO, INC., Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: THORNBERRY, RONEY and HILL, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Kranco, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on February 18, 1977, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on March 15, 1978, and has considered the briefs and transcript of record filed in this cause. On April 11, 1978, the Court, being fully advised in the premises, issued its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced,

and that Kranco, Inc., Houston, Texas, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

Costs are taxed against petitioner cross-respondent.

ENTERED: May 18, 1978

ISSUED AS MANDATE:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-128

KRANCO, INC.,
Petitioner

against

NATIONAL LABOR RELATIONS BOARD,
Respondent

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The National Labor Relations Board has apparently chosen not to oppose the Petition for a Writ of Certiorari previously filed by Kranco, Inc. in this cause. This is no doubt due to their inability to refute the assertion that the decision rendered by the Fifth Circuit Court of Appeals in the instant case is in direct conflict with those of other courts of appeal and of the Supreme Court. The divergent views regarding the burdens of proof and the criteria for their fulfillment in proceedings under § 8(a)(3) of the LMRA were in fact artfully delineated

by NLRB General Counsel Irving in his address before New York University's National Conference on Labor, delivered June 15, 1978, entitled "How the Board Fares in Court." He explicitly stated:

> ". . . there are several significant areas where one or more circuits strongly disagree with a legal theory the Board has adopted. For example, the First and Ninth Circuits do not accept the Board's test that a discharge motivated in any way by both lawful and unlawful considerations violates the Act. These circuits require that the unlawful motive be dominant, or, stated another way, the employee would not have been discharged "but for" his protected concerted activities. They base their position on a recent Supreme Court decision, *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977), which although not dispositive of the issue, lends weight to the dominant motive test. The Board is now considering its position in this area in light of *Doyle,* before attempting to obtain Supreme Court review." BNA, Daily Labor Report (June 19, 1978).

Hence, any contention by the Board that the law in this area was decisively settled would constitute no more than a pretense since the NLRB itself admits to reconsidering its stance on the matter, and concedes that Supreme Court review will ultimately be necessary.

The time for such review is ripe in the instant case, as demonstrated by the issuance of a recent Fifth Circuit Court of Appeals decision which further compounds the pre-existing decisional disarray in the area of mixed motive discharges under § 8(a)(3) and which confirms that there is an urgent need for a decisive statement by the Supreme Court. In *NLRB v. Big Three Ind. Gas & Equipment Co.,* 579 F.2d 304, 315-316 (5th Cir. 1978), the court announced a garbled standard declaring that in determining the validity of a discharge decision activated by two goals, one legitimate and the other condemnatory, "in this circuit, the threshold for illegality is crossed if the force of the invidious purpose is 'reasonably equal' to the lawful motive prompting conduct." Hence, the court adds a new standard, the "reasonably equal" test, to the ever multiplying melange of standards by which to gauge the propriety of an employee's discharge. However, in a footnote, the court admits that this newly conceived test is contrary to that applied by other circuits, and almost diametrically opposed to that of the First Circuit.

Moreover, the perplexity of its guideline is compounded by the use of the word "threshold," both in the text of the opinion and in the footnote where the court states "in fact, the threshold for illegal motive may not require a reasonable equality, but may, according to some cases, be met if invidious purpose is part of the decision at issue." If the term "threshold" were construed as pertaining to the Board's prima facie case, the statement would probably be in accord with other decisions. In *Big Three* and in the instant case, however, where the employer proffered a valid business justification, the "threshold" had already been crossed, but the door should still have been shut on the Board when it failed to meet its burden of convincingly rebutting the legitimate motive offered by the employer.

In addition, the opinion contains the comment that "the employer has failed to establish that business justification was dominant." This statement specifically contravenes virtually all precedent in this area wherein both

the Fifth Circuit and the other circuits have reiterated on numerous occasions that the employer has the burden only to offer a valid reason for his actions, and then the burden shifts back to the Board to show that the employer was, in reality, motivated predominantly by anti-union animus, rather than by business necessity. *NLRB v. Whitfield Pickle Co.*, 374 F.2d 576 (5th Cir. 1967).

In the *Big Three* decision favorable reference is further made to Judge Thornberry's concurrence in *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1263-1265 (5th Cir. 1978) wherein it is said that he "ably refuted" the contention that the "but for" test applied in the Fifth Circuit to the Board's rebuttal burden. The heart of his analysis was as follows:

> "However, this Court has repeatedly held that the existence of a good cause to fire an employee cannot validate a dismissal that was in fact motivated by union animus. *E.g., N.L.R.B. v. Big Three Indus., Inc.*, 497 F.2d 43, 49 (5th Cir 1974); *N.L.R.B. v. Central Power & Light Co., supra* at 1322. This standard is obviously contrary to a 'but for' test under which an employer filled to the brim with union animus can nonetheless fire an employee who is a union activist if that employee would have been fired anyway.
>
> The Supreme Court has utilized a 'but for' test in first amendment cases, *e.g., Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), but that hardly means the test is appropriate in the labor context. In *Mt. Healthy* the Court, as it has done so often, struck a balance between competing interests. Similar competing interests exist in the labor setting, but there Congress has already established a balance by passing the labor laws. That balance favors the employee, for Congress clearly recognized the superior bargaining position of the employer. *See American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300, 316, 85 S.Ct. 955, 966, 13 L.Ed.2d 855 (1965) (labor laws attempt to redress the 'imbalance of economic power between labor and management'). The 'but for' standard significantly restrikes this balance in favor of the employer, and such a test is contrary to Congressional policy and the case law in this Circuit." *Federal-Mogul Corp. v. N.L.R.B., supra* at 1265.

Petitioner respectfully submits that such controversial analysis only heightens rather than diminishes the necessity that this Court address this issue.

In summary, it is imperative to recognize the interrelationship between the shifting of the burden back to the Board to rebut the employer's business justification and the test to be applied to determine whether the Board has fulfilled its overall burden of proof, for as the stringency of the test decreases, the rebuttal burden cast upon the Board diminishes proportionately. Ultimately, if the criteria by which the Board can refute the employer's legitimate motive becomes quite lax, the shifting of the burden back to the Board becomes an illusion since the Board can always argue that its "prima facie" showing established that the discharge was "in part" unlawfully motivated. Such appears to have occurred in the instant case, when the Fifth Circuit found the Board to have carried its burden by merely labeling the employer's asserted business justification "pretextual" without adducing further evidence, thereby denigrating to a meaningless fiction the long recognized rebuttal burden placed on the Board.

Therefore, it is essential that the Supreme Court analyze the conflicting authorities on the subject, and chart a definitive course governing the analysis of discriminatory discharge cases under the LMRA. To be fully effective, such procedure must encompass both the allocation of the respective burdens between the Board and the employer and succinctly state the test to be utilized to evaluate whether the Board has met its overall burden.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Supplemental Petition for Writ of Certiorari have been served upon Mr. Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570, and Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same to them postage prepaid, at their respective addresses this _____ day of October, 1978.

CLINTON S. MORSE

No. 78-128

In the Supreme Court of the United States

OCTOBER TERM, 1978

KRANCO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 48) is unpublished. The decision and order of the National Labor Relations Board (Pet. App. 17-47) are reported at 228 NLRB 319.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50-51) was entered on May 18, 1978. The petition

for a writ of certiorari was filed on July 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner discharged eleven of its employees because of their union activities in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 158, are set forth at Pet. 3.

STATEMENT

1. The Board, adopting the decision of the administrative law judge, found that petitioner engaged in conduct violative of Section 8(a)(1) of the Act, and that petitioner discharged eleven employees in violation of Section 8(a)(3) and (1). The underlying facts are as follows:

On February 19, 1976,[1] the Union[2] began an overt organizing campaign among petitioner's employees. Petitioner immediately became aware of this activity. A Union leaflet distribution on February 24 announced meetings to be held on February 26 with the day and night shift employees. At the meeting between Union representatives and the night shift employees, approximately 16 of the 30 night shift workers signed and submitted to the Union authorization cards; cards of several others on the night shift were provided by an employee organizer. Two days later, on March 1, another meeting was held with the night shift employees (Pet. App. 19; Tr. 144-149, 198, 408, 482).[3]

Petitioner's response was hostile. On Saturday, February 27, following the initial night shift meeting, night supervisor Michulka began asking employees about their and others' union opinions and activity, including an inquiry as to who was the Union leader on the night shift (Pet. App. 20-21; Tr. 163, 303-309, 412). And on Monday, March 1, one of the day supervisors interrogated an employee as to his union sympathies (Pet. App. 21-22; Tr. 290-291). On Tuesday, March 2, petitioner distributed a letter to the employees stating its opposition to the Union, including a warning which read: "They [the Union] are not doing anything for you except causing you to *risk everything* so they can collect tribute from you" (emphasis supplied) (Pet. App. 19-20; GCX 6).

In the early morning hours of Thursday, March 4, at the conclusion of the night shift, petitioner dis-

[1] All dates herein are in 1976, unless otherwise stated.

[2] Carpenters District Council of Houston and Vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America.

[3] "Tr." refers to the transcript of the hearing before the administrative law judge; "RX" refers to petitioner's exhibits at that hearing; "GCX" refers to the General Counsel's exhibits.

charged ten night shift employees, all of whom had attended Union meetings and/or signed authorization cards for the Union. At that time, a letter from petitioner was read to them, asserting that a shortage of work had "caused us to discontinue our night fabrication work." (Pet. App. 26-27; Tr. 309, 315; GCX 7.) This action constituted the first such elimination of employees in petitioner's history; indeed, new employees were regularly told that they did not have to worry about layoffs. And no indication had been given prior to March 4 that such action would be taken (Pet. App. 27, 31, 32; Tr. 545, 600-601). When confronted by one of the dischargees with the allegation that the discharges were due to the union activity, Michulka nodded his assent (Pet. App. 34, 43 n. 1; Tr. 422, 433).

Later that day—Thursday, March 4—petitioner's vice president, Thomas J. Lee, made speeches to both the night and day shifts in which he stated that work had slackened off, that petitioner had recently acquired a similar company in Ohio, and that petitioner could transfer work from the Ohio plant if work slackened. Lee added, however, that petitioner would not transfer work from Ohio if the Union came in. (Pet. App. 25-26; Tr. 258, 260-261, 378-379, 382, 390, 536-539.)

Five days later, day shift welder James Hindman, a Union supporter, attended a Union meeting at which he was appointed as a witness to accompany the newly appointed in-plant committee when it informed petitioner's plant superintendent Raymond

Vajdak that they would be soliciting membership in the plant. On March 10, they met with Vajdak. Two days later, on March 12, Hindman was discharged, allegedly because of business conditions. (Pet. App. 27; Tr. 265, 272-276.)

2. On these facts, the Board, adopting the decision of the administrative law judge, found that petitioner had violated Section 8(a)(1) of the Act "[b]y threatening employees with loss of employment opportunities or other reprisals, and by interrogating employees concerning their union activity, membership and support." (Pet. App. 34.)

The Board further found that the discharges of March 4 and March 12 violated Section 8(a)(3) because they "were motivated by the employees' union activities, rather than the business conditions" (Pet. App. 30, 34-35). The Board rejected petitioner's contention that the discharges were caused by a decline in the firm's economic fortunes, noting that while the central element of that defense "was the alleged loss of one order and the postponement of two others[, d]etails of these transactions, including the size, scope and timing, and documentary evidence thereof (which must necessarily have existed in contracts of such magnitude) were not offered. Other evidence of its business conditions consisted, in part, of self-serving and vague documents some prepared after the fact." (Pet. App. 31.) The Board further noted inconsistencies in petitioner's arguments, such as (a) its statement in late December 1975 that 1976 would be even more successful than 1975, even though the alleged

cancellation and postponements which purportedly caused the decline were made that same month (Pet. App. 27-28, 31; Tr. 444-445); (b) petitioner's illustrative exhibits which showed that the backlog in March 1976 orders was higher than the previous "record year" (Pet. App. 31-32; RX 1, 9, 10); (c) the fact that petitioner "admitted [that] the early months of each year [were] its usual slow period" (Pet. App. 32; Tr. 37, 524); and (d) the fact that petitioner advertised for new workers in the months following the alleged December losses, and even after the March discharges (Pet. App. 33; Tr. 45-46, 606-607, 611-612; GCX 4).

Moreover, the Board found that, even assuming there had been economic justification for a layoff, a number of factors demonstrated that petitioner's "claimed justification" (Pet. App. 33) was not its actual motive for the discharges. Thus, the decision to discharge

> was made almost immediately upon the inception of the union activity and [petitioner's] acquisition of knowledge thereof. The discharges took place in the same time span and on the day between [petitioner's] antiunion letter and Lee's antiunion speeches. They also occurred in midweek, with no advance warning to the employees, and in the absence of any event which might have occasioned such precipitous action. [Pet. App. 31.]

Furthermore, the Board pointed out, petitioner "had met slow periods before without layoffs" and although

business allegedly began to slacken in December, petitioner "continued its overtime, 2 hours per day per employee plus Saturday work through January, and 1 hour per day even after the discharges in question" (Pet. App. 32; Tr. 342, 530, 545, 600-601). Rejecting petitioner's argument that reduction in overtime would have created a "morale problem," the Board stated (Pet. App. 32-33):

> It seems clear that discharges, after a history that did not even include layoffs, would be at least equally threatening to morale. Further, faced with an alleged economic situation warranting a reduction in profit margin, it is unlikely that [petitioner] would have rejected the savings potential of premium pay * * *. [W]hile there was no evidence of any permanent change in the pattern of [petitioner's] business, [petitioner] did not lay off the employees in question, [it] discharged them.

Finally, the Board noted supervisor Michulka's affirmation of the charge that the discharges were motivated by the Union activities[4] (Pet. App. 34).

ARGUMENT

Petitioner essentially contends that the Board improperly rejected its assertion that the discharges

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[4] The Board, contrary to the administrative law judge, found this affirmation to be violative of Section 8(a)(1) as well, since as "to employees who were not discharged, it was tantamount to a threat of similar treatment for them if they chose to engage, or continued to engage, in union activities" (Pet. App. 43 n.1).

were motivated by legitimate economic considerations. That contention raises only an evidentiary question that does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951).

Contrary to petitioner (Pet. 11-14), this decision is not in conflict with *Stone & Webster Engineering Corp.* v. *National Labor Relations Board*, 536 F. 2d 461 (1st Cir. 1976). As the First Circuit noted there (*id.* at 464), the "standard of review in considering the conclusion of the administrative law judge and the Board that the complainants were terminated in order to discourage membership in or activity on behalf of the Union is that of substantial evidence." In that case, the Court concluded that, where "the Board neither directly challenged the accuracy of the evidence concerning economic necessity nor affirmatively showed that it was a cloak for actual discriminatory motivation," the Board was not warranted in rejecting the assertions of economic justification. Here, however, the evidence did establish that the alleged economic necessity was a "cloak for actual discriminatory motivation": Not only did the timing directly coincide with the surfacing of the organizational campaign, but petitioner's vice president, in explaining the situation immediately after the March 4 discharges, effectively told the employees that work would have been transferred to them from a newly acquired plant *but for* the Union activity. Furthermore, as the Board explained, the terminations occurred precipitously in mid-week and were labeled

discharges, rather than layoffs, even though there was no indication that the alleged drop in business was permanent and petitioner had a history of retaining workers through slow periods. Finally, one of petitioner's supervisors admitted that anti-union animus was the cause of the discharges.

The Board did not rely only on petitioner's failure to substantiate loss of business in rejecting that defense. Rather, in finding the assertion to be pretextual, it noted that petitioner continued substantial regular overtime after the alleged order cancellations and postponements and even after the discharges, had a high backlog of orders for March, and continued advertisement for new workers. This was not, as petitioner contends (Pet. 13), simply to rely on the General Counsel's *prima facie* showing of discriminatory motivation: the Board found evidence that overwhelmingly demonstrated that protected union activity, rather than petitioner's alleged economic condition, was the cause of the discharges.[5]

Nor is there merit to petitioner's contention (Pet. 13-14) that the instant case presents a conflict between the various circuits as to the standard to be applied in discriminatory discharge cases where there exist both proper and improper motives for discharge.

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[5] Therefore *Furnco Construction Corp.* v. *Waters*, No. 77-369 (June 29, 1978), where, in a Title VII context, a bare *prima facie* case of discrimination was insufficient to support a finding of discrimination where business justification for the employer's practices was presented, is of no aid to petitioner.

The Board did not find that petitioner was motivated by union *and* economic considerations. Rather, the Board concluded that, even if business actually declined, the claim that the discharges were predicated on any decline was pretextual. (Pet. App. 33.) Therefore, any difference among the circuits as to the "'quantum of animus'" (Pet. 13) which must be proven in mixed motive cases is irrelevant here. This case affords no occasion to decide that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

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Having reviewed the belated brief in opposition filed in this cause by Respondent National Labor Relations Board (the "Board"), Petitioner Kranco, Inc. ("Kranco") respectfully directs the Court's attention to the following points:

I.

INTRODUCTION

In its brief, the Board predictably cites this Court to the substantial evidence rule governing appellate court review of administrative determinations, and after summarizing for the Court only that evidence supporting its

findings and conclusions, argues that the case "raises only an evidentiary question which does not warrant review by this Court." (Res. Br. 8). Such argument clearly invites a misapplication of the substantial evidence rule. In *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456 (1971), this Court emphasized that the substantial evidence rule is not satisfied merely by a showing that there is record evidence which when viewed in isolation substantiates the Board's findings. The record must be considered as a whole, taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Id.* at 488, 489. This Court further made clear that under the substantial evidence rule "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, *including the body of evidence opposed to the Board's view.*" *Id.* at 489 (emphasis supplied).

Denial of certiorari pursuant to the substantial evidence rule is particularly unwarranted when, as in the instant case, the petitioner argues and the record confirms that in reaching its result the Board committed fundamental errors of law which effectively foreclosed consideration of all evidence contrary to its view of the case. Thus, the substantial evidence rule cannot spare the Board from the consequences of its legal transgressions in this case.

II.

FAILURE TO REFUTE ECONOMIC JUSTIFICATION

To support the bare assertion in its brief that the evidence in this case overwhelmingly demonstrated that

the employees in question were discriminatorily discharged, the Board states *inter alia* that five days after the initial terminations, day-shift welder James Hindman acted as a witness when the in-plant committee informed petitioner's plant superintendent Raymond Vajak of the union's organizational campaign, and two days later, on March 12, Mr. Hindman was also terminated (Res. Br. 4-5). In so representing such issue to this Court, the Board disregarded, as it has throughout this case, Mr. Hindman's candid testimony, when called as a witness by the Board to explain the circumstances surrounding his termination. Beginning with his explanation of what was said when his supervisor, Mr. Chapman, told him that the company was letting him go, Mr. Hindman's testimony reads in material part as follows:

> Q: Did you say anything to Mr. Chapman?
>
> A: Well he said to me, you know, that he was sorry that this had to happen and that I was a good worker and everything and he hated to have to let me go. And I just told him you know that I understood the situation. (Tr. 276)
>
> * * *
>
> Q: Well, when you said you understood the situation, what did you mean?
>
> * * *
>
> A: That I knew that there was—I had heard earlier that day that there would be five people laid off and I figured I would be one of them because I hadn't worked there but a month and that's what I meant by it.
>
> Q: All right. You were, of course aware of the terminations on the night shift a week before?

A: Yes sir.

Q: Were you aware that there was not, did not appear to be a lot of work in the shop?

A: There wasn't very much going on in the shop.

Q: How long had that situation existed?

A: From—when I was terminated, before that?

Q: Yes.

A: Oh, say about two weeks before that I could see that it suddenly started slowing down.

Q: And you notice that yourself?

A: Yes sir. (Tr. 281-282)

Furthermore, the Board never presented any evidence and has never charged that any adversity befell any other members of the union in-plant committee who met with Mr. Vajak. And conversely, the Board never presented evidence and has never charged that other employees that the company did let go on March 12 and on subsequent dates during March and April were the victims of discrimination. All told during March and April there were roughly forty terminations in the production department at Kranco (Tr. 135). Approximately twenty were involuntary terminations about the same number were voluntary (Tr. 136), many of the latter having been caused by Kranco's elimination of overtime (Tr. 135 472). None of these employees were replaced, and the company's work force was thus reduced to between eighty and ninety (Tr. 138). Notwithstanding all of the foregoing, the Board determined that petitioner's economic justification was pretextual and therefore concluded that the March 4 terminations and Mr. Hindman's termination on March 12 were discriminatorily motivated.

How the Board could have reached a conclusion so divorced from economic realities is plainly explained in the Board's Brief in Opposition at page 6, wherein the Board sets forth the evidentiary basis upon which it determined petitioner's economic justification to be pretextual. That portion of the administrative law judge's decision quoted therein references basically a precipitous termination of union adherents amid evidence of employer animus toward the union organizational drive, and thus defines a classic *prima facie* case supporting an inference of discriminatory discharge.[1] *E.g., Cain's Coffee Co. v. NLRB*, 404 F.2d 1172, 1175-1176 (10th Cir. 1968); *NLRB v. Freemont Mfg. Co.*, 95 LRRM 3095, 3096 (8th Cir. 1977). In relying on such evidence not only to support a *prima facie* case, but also to discredit the petitioner's economic justification, the Board clearly has given conclusive weight to a mere *prima facie* showing in direct contravention of this Court's teachings in *Furnco Construction Corp. v. Waters*, 46 LW 4966 (1978).[2]

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1. Although the Board states that the terminations were effected "almost immediately" upon the inception of union activity and [petitioner's] acquisition of knowledge thereof, indeed there is a two-week separation between the two. Demonstrating further remarkable liberties with the facts, the Board concluded that Kranco's terminations centered upon known union adherents. In truth and in fact, however, there is no direct evidence in the record that the company knew at the time of their terminations that employees Mason, Armstrong, Starnes, Hundl and Carriere supported the union, and proof that the company knew that Gilmer supported the union is tenuous. Moreover, it was particularly within the province of the union to disclose that its organizational efforts and support were concentrated among the night shift employees in the structural department. However, neither the general counsel nor the union offered such evidence. Accordingly, the Board's finding that the company knew that union activity was strong, if not centered, among the night shift employees in the structural department is sheer speculation. (ALJD p. 10, l. 12-24).

2. The Board also references other extraneous bits of circumstantial evidence, none of which, if accurately recounted, is particu-

The Board's brief also demonstrates with equal clarity its determination not to abide by the "but for" test. The record is clear that the company effected its March 4 terminations on the night shift strictly on the basis of seniority in order to facilitate the company's overall goal to eliminate its night shift, which is a traditional economic measure during periods of declining business. Terminations based on seniority and designed to eliminate second shift operations are generally considered the most objective and indisputable means through which to effect a reduction in force. Thus, under the "but for" test, where an economically necessitated layoff is effected on the basis of seniority, the fact that a company "welcomes" the opportunity to discharge union adherents does not make the layoff discriminatory or unlawful. *NLRB v. Beech Aircraft Corp.*, 483 F.2d 51, 55 (10th Cir. 1973). Scrupulously avoiding the foregoing, the Board's brief repeatedly focuses on the Machulka head nod. However, in doing so, the Board merely highlights the fact that the

larly relevant. Thus, although the Board notes that petitioner's exhibits showed that the backlog for March, 1976 orders was higher than the previous "record year" (Res. Br. 6), as petitioner has repeatedly explained, that "backlog" had been almost completely exhausted by the time of the terminations and the company was rapidly reaching the "bottom of the barrel." (Pet. Br. 8). The Board also argues that the company advertised for new workers after the March discharges. (Res. Br. 6.) But see Pet. Br. 6, n. 2. The Board also incorrectly refers to the layoffs as "discharges," whereas the record is clear that they were called "terminations for lack of work." (Res. Br. 4). Moreover, management had no expectation of being able to re-employ any of the affected employees within the foreseeable future (Pet. Br. 7-8). Finally, in suggesting that the company deliberately withheld the work which could have been transferred from a newly acquired plant in Ohio (Res. Br. 8), the Board seriously misstates the record and asks this Court to accept the insupportable proposition that the company would seriously disrupt its production and submit a substantially revised budget to its parent company simply to rid itself of some union activists.

only record evidence even remotely relating to its rebuttal burden was equivocal in nature, was not in the opinion of the judge who heard the case entitled to "great weight" and in any event, was not dispositive of the issue.

CONCLUSION

This case stands as a landmark to the evils which result when the Board fails to adhere to applicable burdens of proof and ultimately fails to adduce evidence meeting the "but for" test. For in spite of petitioner's explanation that it suffered a fifty per cent reduction in the amount of available work for production employees, the Board simply ran roughshod over petitioner's economic justification, substituted its judgment for that of management, and peremptorily concluded that since the company had "met slow periods before without layoffs," it was obliged to do so again in the instant case. (Res. Br. 7). In light of the Board's failure to contradict in any meaningful way petitioner's documented explanation that the March 1976 business reversals were of an unprecedented magnitude, the Board, as a governmental agency, was simply not entitled to contradict management's decision to effect a reduction in force.[3]

3. Similarly ill-founded is the Board's criticism of Kranco management's handling of overtime during the period in question. It should be pointed out that company witnesses uniformly testified that they were hesitant to eliminate overtime for fear of losing experienced employees, and it certainly stands to reason that employees in general are not likely to welcome substantial reductions in their pay. Moreover, it is a fact that the company lost twenty employees through voluntary terminations during the period in question, in part because of elimination of overtime. Furthermore, elimination of overtime would have reduced production across the board, whereas the company in its terminations was seeking to reduce its work force in the fabrication department in which work shortage was most acute. Finally, shortly after the terminations in question, the company did in fact eliminate all overtime. In view of these

The Board cannot dispute the confusion which has overtaken this area of the law and which is proceeding at an ever accelerating pace. This case draws in stark relief the issues which must be resolved if clarity is to be restored; and, accordingly, petitioner renews its prayer that *certiorari* be granted.

Respectfully submitted,

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circumstances and the short period of time involved, the sequence in which the company took such measures is of virtually no significance in determining the company's motives for the terminations.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief of Petitioner for Writ of Certiorari have been served upon Mr. Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570, and Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same to them postage prepaid, at their respective addresses this _____ day of November, 1978.

CLINTON S. MORSE